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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 309

AKTIEBOLAGET SEPARATOR,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BENJAMIN A. MATTHEWS,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 309

AKTIEBOLAGET SEPARATOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Aktiebolaget Separator, taxpayer, for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit alleges:

By its judgment of July 6, 1942 (R. 137) the Circuit Court of Appeals has affirmed the order of the Board of Tax Appeals made September 30, 1941 (R. 34), which determined that there was a deficiency of $46,697.60 in income tax for the year 1936.

Statement of Facts.

The uncontroverted facts as they appear from the Statement of Evidence and exhibits (R. 43-132) and from the

findings of the Board of Tax Appeals (R. 19-26) may be summarized as follows:

Petitioner is a corporation organized in 1883 under the Laws of the Kingdom of Sweden and at all times since then has had its principal office in Stockholm, Sweden. It is engaged in the manufacture of centrifugal machinery and has interests throughout Europe and elsewhere. It is not, and during the taxable year was not engaged in trade or business within the United States (R. 19).

On October 23, 1936, petitioner, having decided to establish an office in New York, leased for the purpose Room 1521 in the building at No. 165 Broadway, New York, from The De Laval Separator Company, for a two-year term from November 1, 1936, at an annual rental of $500 (Ex. 1, R. 45, 86). Petitioner entered into possession of Room 1521 on November 1, 1936, and occupied it up to the date of trial (R. 47, 83).

The De Laval Separator Company, a New Jersey corporation, has had its principal office at 165 Broadway since 1907. During the taxable year and for many years prior thereto, petitioner owned approximately 85% of its stock. The De Laval Steam Turbine Company, a New Jersey corporation, also has had an executive office at 165 Broadway since 1907, but its principal place of business is at Trenton, New Jersey. Both of the De Laval companies have maintained their offices on the 15th floor of the building at 165 Broadway under a lease in the name of The De Laval Separator Company (R. 20).

An employee of the subsidiaries, for the additional compensation of $25 per month (R. 21) was placed in charge of petitioner's office in Room 1521 (R. 21).

Petitioner's name was conspicuously displayed at the entrance of Room 1521, and appeared on the building bulletin boards (R. 22, 47, 48, 84). The office had a cable

address separate from that of the De Laval companies. This office and cable address appeared on petitioner's stationery used by its New York office (R. 22, 49; Exs. 5, 6, R. 50, 90, 91). Petitioner's representatives, including its managing director, used the office when in the United States (R. 24, 72, 73).

The employee in charge of the office was duly authorized by petitioner (R. 21; Ex. 3, R. 46, 88) to perform various necessary duties on its behalf and to sign checks on one of petitioner's New York bank accounts (R. 21-22). Books were set up and maintained (R. 56, 72; Ex. 14, R. 57, 100); files were established (R. 72); funds were borrowed and used (Ex. 14, R. 57, 100, Ex. 29, R. 66, 124); and petitioner's tax obligations received all necessary attention (R. 74). Funds received were deposited in petitioner's bank account and were transmitted to Sweden as instructed. Periodical reports were made to petitioner's head office in Stockholm.

In November, 1936, petitioner advised the De Laval companies that it had opened an office at 165 Broadway, New York, New York, and instructed them to deliver all future dividends and notices to its office at that address. The De Laval companies notified the Commissioner of Internal Revenue and informed him that thereafter they would pay dividends to petitioner at its New York office and (under Regulations 94, Article [illegible]2) would not withhold the tax (R. 25; Exs. 7, R. 52, 93; Ex. 9, R. 53, 96). The Deputy Commissioner gave his approval by letter dated December 9, 1936 (R. 25; Exs. 8, R. 62. 95; Ex. 10, R. 62, 98). Federal income taxes were not withheld or deducted by the De Laval companies. The dividends were paid directly to petitioner at its New York office and were deposited in petitioner's account with the Marine Midland Trust Company (R. 25, 26; Ex. 13, R. 56, 100; Ex. 14, R. 57, 100; Ex. 16, R. 60, 102).

During 1936 petitioner's income from sources within the United States consisted of these dividends, aggregating $693,973.75. Each of the De Laval companies was a domestic corporation, subject to taxation under Title I of the Revenue Act of 1936 (R. 20).

Petitioner's Federal income tax return for the year in question was filed with the Collector of Internal Revenue for the Second District of New York (R. 20).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (43 Stat. 938).

Statute.

The portions of the Revenue Act of 1936 (49 Stat. 1717) that are material are as follows:

SEC. 231. TAX ON FOREIGN CORPORATIONS.

(a) *Nonresident Corporations:* There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 13 and 14, upon the amount received by every foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, except that in the case of dividends the rate shall be 10 per centum, and except that in the case of corporations organized under the laws of a contiguous country such rate of 10 per centum with respect to dividends shall be reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country.

(b) *Resident Corporations:* A foreign corporation engaged in trade or business within the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a), but the normal tax imposed by section 13 shall be at the rate of 22 per centum instead of at the rates provided in such section.

Question.

Whether the petitioner, a Swedish corporation, had an office or place of business in the United States within the meaning of Section 231 of the Revenue Act of 1936.

The Board of Tax Appeals in its opinion reported at 45 B. T. A. 243 (three members dissenting) held that petitioner's office did not come within the statute because petitioner was not engaged in trade or business in the United States and its office was not established for the purpose of transacting trade or business.

On the basis of this holding the Board of Tax Appeals at the same time decided *Linen Thread Company* v. *Commissioner of Internal Revenue,* (unreported).

The *Linen Thread* case was affirmed by the Circuit Court of Appeals (128 F. (2d) 166) the court holding in an opinion dated May 15, 1942, that an office or place of business which was not used or kept for the transaction of the ordinary or principal business of the corporation did not come within the meaning of the statute as interpreted by Regulations 94, Article 231-1(b). Based on that opinion the Circuit Court affirmed the order of the Board of Tax Appeals in the instant case.

Reasons for Granting Certiorari.

The reasons for granting certiorari in this case are:

1. The question is of public importance. The Board of Tax Appeals and the Circuit Court of Appeals have inter-

preted and applied the statute contrary to its plain meaning, and in complete disregard of the rules of statutory construction. The question of interpretation not only affects Section 231 of the Revenue Act of 1936, but also affects the same statutory language employed in Section 211, relating to resident and nonresident aliens. The interpretation would apply also to all years after 1936, since the same language has been employed in subsequent Acts.

2. No other Circuit Court of Appeals has directly passed upon the question and it has never been considered by this Court. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

3. The Circuit Court of Appeals has decided a Federal question in a way which is in conflict with the applicable decisions of this Court. The effect of the decision of the court below is to deny recognition of the existence of a corporate office unless the corporation is engaged in carrying on its trade or business at such office. Such a result conflicts with the decisions of this Court (*Green* v. *Chicago, Burlington & Quincy Railway Co.* (1907) 205 U. S. 530; *Toledo Railways & Light Company* v. *Hill,* (1917) 244 U. S. 49, 52; *McCoach* v. *Minehill Railway Co.* (1913) 228 U. S. 295, and numerous other authorities which have recognized that a corporation may have an office, although not carrying on business therefrom so as to be subject to service of process or to State taxation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this Court for its review and determination on

a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "Aktiebolaget Separator, petitioner, *vs.* Commissioner of Internal Revenue, respondent, No. 272," and that the said judgment of the said court may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Dated New York, N. Y., August 5, 1942.

AKTIEBOLAGET SEPARATOR,
By BENJAMIN A. MATTHEWS,
HAROLD HARPER,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 309

AKTIEBOLAGET SEPARATOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Statement.

Section 231 of the Revenue Act of 1936 provides that "every foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein," shall be taxed under subsection (a) of that section. Subsection (b) provides that "a foreign corporation engaged in trade or business within the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a)."

The single question presented is whether a foreign corporation which maintains an office in the United States, but does not carry on its principal trade or business there-

from, is taxable under subsection (a), as the Commissioner claims, or under subsection (b), as the taxpayer claims.

The Board of Tax Appeals held that the petitioner was taxable as a nonresident foreign corporation under subsection (a) and consequently that there was a deficiency in income tax for 1936. The Board's opinion, dated September 30, 1941 (R. 19-33), is reported in 45 B. T. A. 243. The Second Circuit Court of Appeals affirmed the Board of Tax Appeals. Its decision, dated June 19, 1942, printed in the record (R. 136), was based upon its opinion in *Linen Thread Company* v. *Commissioner of Internal Revenue,* reported in 128 F. (2d) 166.

The date of the judgment of the Circuit Court of Appeals for the Second Circuit to be reviewed by this Court is July 6, 1942 (R. 137). The facts are summarized in the petition for certiorari.

Summary of Argument.

The decision below failed to take into consideration that the legislative intent and reason in prescribing a different method of taxation in subsection (a) from that prescribed in subsection (b) was wholly based upon administrative convenience in the collection of the tax. There was no reason for withholding from gross income at the source if the corporation maintained an office in the United States at which its net income within the United States could be determined and payment of the tax enforced. Whether or not the corporation carried on its principal trade or business from that office was immaterial. This interpretation does no violence to the word "office" which in its every-day meaning signifies only a place where a representative and records of the corporation can be found, and does not necessarily include the carrying on of a trade or business therefrom.

ARGUMENT.

I. The reason for prescribing different methods of taxing foreign corporations in Section 231 is wholly one of administrative convenience in the collection of the tax. A corporation which maintains an office in the United States where the amount of tax can be determined and collected is properly classified under Subsection (b) as a resident foreign corporation.

The differentiation betweeen nonresident and resident foreign corporations and the methods of taxing them was made in the 1936 Act because it was believed to be more convenient and effective, from the standpoint of administration of the tax, to apply a flat rate of tax upon the gross income of those corporations whose income tax was withheld at the source. A nonresident foreign corporation is simply a foreign corporation from which it is necessary to collect income tax at the source.

Under prior acts,[1] *all* foreign corporations whether or not engaged in trade or business in the United States and whether or not they had an office or place of business here, were taxed on their *net* income from sources within the United States. Provision was made for withholding the tax at the source of income payable to foreign corporations "not engaged in trade or business within the United States and not having an office or place of business therein."[2] All foreign corporations were allowed deduc-

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[1] Revenue Act of 1934, Sec. 231, 48 Stat. 737; Revenue Act of 1932, Sec. 231, 47 Stat. 229; Revenue Act of 1928, Sec. 231, 45 Stat. 849; Revenue Act of 1926, Sec. 233(b), 44 Stat. 41; Revenue Act of 1924, Sec. 233(b), 43 Stat. 283.

[2] Revenue Act of 1934, Sec. 144, 48 Stat. 724; Revenue Act of 1932, Sec. 144, 47 Stat. 216; Revenue Act of 1928, Sec. 145, 45 Stat. 835; Revenue Act of 1926, Sec. 237, 44 Stat. 43; Revenue Act of 1924, Sec. 237, 43 Stat. 285.

tions and credits similar to those allowed domestic corporations, the benefit of which could be secured by filing a return. A foreign corporation "not having an office or place of business in the United States" could file the return and pay the tax six months and fifteen days following the close of the fiscal or calendar year.[3]

The obvious difficulties attendant upon permitting deductions and credits to be made by a taxpayer whose tax was withheld at the source by persons who could give the Collector no information that would enable him to determine the correctness of such deductions and credits, required a change from a tax on net income to a tax on gross income.

The revision in the 1936 Act was made for the express purpose of securing better administrative control over the collection of taxes from nonresident foreign corporations and from nonresident aliens. It was the belief of both the House Ways and Means Committee (House Rept. 2475, 74th Cong., p. 9, et seq.), and of the Senate Finance Committee (Sen. Rept. 2156, 74th Cong., p. 21, et seq.), in recommending the new Act, that "the proposed revision of our system of taxing *nonresident* aliens and foreign corporations will be productive of substantial amounts of additional revenue, since it replaces a theoretical system impractical of administration in a great number of cases."

When Congress in the 1936 Act set up a category of nonresident foreign corporations, it employed the identical language which it had used in the 1934 and preceding acts in describing corporations whose income was subject to withholding at the source, to wit, foreign corporations "not

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[3] Revenue Act of 1934, Secs. 232-236, 48 Stat. 737; Revenue Act of 1932, Secs. 232-236, 47 Stat. 230; Revenue Act of 1928, Secs. 232-236, 45 Stat. 849. As to deductions see Revenue Act of 1926, Sec. 234(b), 44 Stat. 43; Revenue Act of 1924, Sec. 234(b), 43 Stat. 285. As to returns see Revenue Act of 1926, Secs. 239(a), 241(a), 44 Stat. 45, 46; Revenue Act of 1924, Secs. 239(a), 241(a), 43 Stat. 287, 288.

engaged in trade or business within the United States and not having an office or place of business therein." The nonresident foreign corporations of the 1936 Act were thus nothing but the old source-taxed corporations of the 1934 and prior acts with a new appellation.

Such corporations were to be dealt with upon a new basis. The tax was still to be withheld at the source and paid to the collector by the withholding agent. However, the new tax was imposed upon the fixed or determinable *gross* income received annually or periodically by such corporations from sources within the United States. The *nonresident* corporation no longer could secure the benefit of any deductions or credits. There was no necessity for its filing a return (Regulations 94, Articles 231-3, 232-1, 233-1, 235-2).

As to *resident* foreign corporations, the 1936 Act made no change. They were taxed, as all foreign corporations theretofore had been, on substantially the same basis as domestic corporations (although the rate of tax imposed on them was slightly higher). The tax continued to be imposed upon all of their *net* income from sources within the United States, and the deductions and credits to which they were entitled were similar to those allowed domestic corporations (Regulations 94, Article 232-1 (b)).

"Having an office or place of business" within the United States as used in Section 231 has no significance except as it relates to the feasibility of determining and collecting the tax. Clearly, if a corporation has no office or other place in the United States where its records as to American income and expenses are kept, and if there are no records of business transacted by it here, then there is no practicable way of checking its returns to ascertain whether it has correctly reported all of its income and whether the deductions taken are proper. A flat tax withheld at the source upon the gross income of such a corporation was clearly indicated as the best method of securing uniform collection.

On the other hand, Congress was satisfied that there had been, and would be, no difficulty about ascertaining and collecting, in the usual way, the correct amount of tax due from corporations having an office or other place here at which records of its American income and expenditures were kept, and could be found by the collector. It was entirely practicable in such cases to impose the tax upon net income. Of course, if it were doing business here, it would have such an office or place of business, or at least an agent or American representative of some kind, who would know about its American affairs and could be examined concerning them. *It was not the doing of business here that made it practicable to determine the correct amount of tax based on net income. It was the fact that a corporate representative and records could be found here.*

The 1936 Act did not impose any new tax upon resident foreign corporations. It did not confer an exemption or other special benefit on resident foreign corporations. It did not impose a tax on the privilege of engaging in a trade or business in the United States. It simply provided a more effective method of determining the tax to be paid by those foreign corporations whose income had been withheld at the source under the 1934 and prior acts, and designated such foreign corporations "nonresident." Other foreign corporations were designated "resident" and this category by express statutory definition included those having an office in the United States.

II. The statute unequivocally provides that a foreign corporation having an office in the United States shall be taxable as a resident foreign corporation under Section 231 (b).

A. *The clear language employed in Section 231 forbids a different meaning or application.*

In both subsections (a) and (b) the phrase "engaged in trade or business in the United States" is alternative with "having an office or place of business therein." The statute thus takes note of the common corporate practice of maintaining an office in jurisdictions other than those in which the corporation carries on its trade or business.

A foreign corporation, in order to qualify as a nonresident corporation under subsection (a), must show not only that it is "not engaged in trade or business within the United States" but also that it does not have "an office or place of business therein." A foreign corporation cannot be classified under subsection (a) unless both disqualifying conditions are absent. This Court has said of other provisions in a tax statute, "These conditions are expressed conjunctively; and it would be inadmissible in construing a taxing act to read them as if described disjunctively." *United States* v. *Field* (1921), 255 U. S. 257, 262.

In subsection (b), on the other hand, "having an office or place of business therein" is disjunctively set off, by the word "or," against "engaged in trade or business within the United States." Since each of these conditions "is complete in itself, 'or' merits its normal disjunctive meaning, *i. e.,* introductive of an alternative standard." *Gay Union Corporation* v. *Wallace* (App. D. C. 1940), 112 Fed. (2d) 192, 196, cert. denied 310 U. S. 647. Thus, a foreign corporation qualifies as a resident corporation under subsection (b) if it is either "engaged in trade or business in the United States" or else has "an office or place of business therein."

These complementary provisions of Section 231 clearly indicate that a foreign corporation which has an office or place of business in the United States cannot qualify under subsection (a) but can only qualify under subsection (b),

whether it is engaged in trade or business in the United States or not.

The meaning of the phrase "having an office or place of business" is free from ambiguity. It cannot be distorted to mean "office for the transaction of business or other place of business." In the absence of ambiguity there is no room for construction. *Caminetti* v. *United States* (1917), 242 U. S. 470, 485, 490.

In *Crooks* v. *Harrelson* (1930), 282 U. S. 55, the Court had under consideration Section 402 of the Revenue Act of 1918 which provided that the value of the gross estate for estate tax purposes should be determined by including therein all property (p. 57) "to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate *and* the expenses of its administration *and* is subject to distribution as part of his estate." (Italics added.) The Court followed the *Field* case, *supra*, in holding that the requirements of this statute being expressed conjunctively, all of the requirements must be met, and consequently the statute had no application to property which was not subject to the payment of administration expenses. The Court said (p. 61):

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness."

In *United States* v. *Merriam* (1923), 263 U. S. 179, 187-188, the Court said (p. 187):

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words

employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used."

The Board of Tax Appeals deemed it necessary to construe the word "office" to mean an "office for the transaction of business" because of its association in the same section with the terms "engaged in trade or business" and "place of business" thereby ignoring the clear meaning of the word "office" (R. 28). Where the meaning of a word, considered by itself, is not in doubt, however, neither the rule of *noscitur a sociis* nor any other rule of statutory construction may be invoked for the purpose of creating an ambiguity. *Russell Co.* v. *United States* (1923), 261 U. S. 514, 520; *United States* v. *Missouri Pacific Railroad Company* (1929), 278 U. S. 269, 277; *In Re Boggs-Rice Co.* (4th C. C. A. 1933), 66 F. (2d) 855, 858.

B. *As applied to a corporation, "office" has a well-defined commonly accepted meaning which does not necessarily include the carrying on of a trade or business therefrom.*

"Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."

United States v. *Temple* (1881), 105 U. S. 97, 99;
DeGanay v. *Lederer* (1919), 250 U. S. 376;
United States v. *Wurts* (1938), 303 U. S. 414, 417.

There is no uncertainty about the meaning of "office," "place of business," or "engaged in trade or business." Their several meanings have been uniformly recognized and enforced both by the federal and state courts in interpreting statutes involving taxation or the service of process. It was conceded or established in each of the follow-

ing cases that the corporation had an office or place of business within a particular state, but it was held, nevertheless, that the corporation was not subject to service of process or to the imposition of an excise or license tax (as the case might be) because it was not engaged in a trade or business therein.

Green v. *Chicago, Burlington & Quincy Railway Co.* (1907), 205 U. S. 530;

Toledo Railways & Light Company v. *Hill* (1917), 244 U S. 49, 52;

Maxfield v. *Canadian Pacific Railway Co.* (8th C. C. A. 1934), 70 F. (2d) 982, 984; cert. denied 293 U. S. 610, rehearing denied 293 U. S. 632;

Case v. *Smith, Lineaweaver & Co.* (C. C. E. D. N. Y. 1907), 152 Fed. 730, 731;

Fowble v. *Chesapeake & Ohio Railway Company* (D. C. S. D. N. Y. 1926), 16 F. (2d) 504, 505;

Hilton v. *Northwestern Expanded Metal Co.* (D. C. N. D. Ga. 1926), 16 F. (2d) 821, 822;

International Fuel & Iron Corp. v. *Donner Steel Company, Inc.* (1926), 242 N. Y. 224, 229;

People ex rel. Manila El. R. R. & L. Co. v. *Knapp* (1920), 229 N. Y. 502, 509.

In *People ex rel. Manila El. R. R. & L. Co.* v. *Knapp, supra,* a Connecticut corporation maintaining an office in New York City for the receipt, deposit and distribution of dividends, the maintenance of bank accounts and attention to its financing requirements, was held not subject to the New York license and franchise taxes by reason of such activities. The Court said (p. 509):

> "Each of those activities might as effectively, though not as conveniently, perhaps, have been done at the statutory office of Hartford. In the world of business and industry it would not have been thought that they

were subject to the interdiction or required for their validity or regularity the franchise of the state. The use or occupation by a foreign corporation of an office in this state for and the exercise there of the management or conducting in whole or in part of its internal affairs is not within the intendment of the Tax Law the doing of business in this state. A foreign corporation may be within this state for corporate purposes and not be doing business here within the meaning of taxing statutes."

A corporation may have a "place of business" even though it does not sell its goods there. *Chadeloid Chemical Co.* v. *Chicago Wood Finishing Co.* (C. C. S. D. N. Y. 1910), 180 Fed. 770, 771.

The Corporation Tax Law of 1909 (36 Stat. 112-113, C. 6, § 38) imposed an excise tax on corporations "engaged in business" in the United States with respect to "carrying on or doing business." It was consistently held that corporations merely maintaining an office in the United States were not subject to the tax. *McCoach* v. *Minehill Railway Co.* (1913), 228 U. S. 295; *State Line & S. R. Co.* v. *Davis* (D. C. M. D. Pa. 1915), 228 Fed. 246; *Bryant & May* v. *Scott* (D. C. N. D. Cal. 2d Div. 1914), 226 Fed. 875.

"Office" as applied to a corporation has a well-established meaning. It is a fixed place in which an authorized representative of the corporation may customarily be found, where corporate records are kept, and where corporate affairs are controlled and handled. That is the sense in which it was used in Section 231.

C. *A reading of the statute as a whole indicates that Congress attributed a meaning to "office" entirely independent of any association with the carrying on of a business.*

The phrase "engaged in trade or business," and the alternative phrase "having an office or place of business,"

are found not only in subdivision (a) and (b) of Section 231, but also in many other parts of the Revenue Act of 1936. These same phrases are found in the withholding provisions of Sections 143 (a), in 144 (a) and (b), and in the provisions taxing aliens contained in subsections (a) and (b) of Section 211. That these alternative phrases do not have the same meaning is evidenced by the meticulous preservation of their distinction throughout the Act, as well as in both committee reports. To ignore that distinction would require a rewriting of these important and substantial provisions of the Revenue Act by deleting the second phrase as superfluous. This the courts will not do.

> "* * * words which have a meaning, are not to be entirely disregarded in construing a statute." *Postmaster-General* v. *Early* (1827), 25 U. S. 135, 146.

The instances in which the words "engaged in trade or business" or the words "having an office or place of business" are used alone in the statute demonstrate that Congress did not regard these phrases as parts of a single concept, but differentiated between them, using each where it was appropriate.

Section 119 (a) (3), defining income from sources within the United States, excludes compensation paid a non-resident alien while temporarily in the United States for services performed for a "foreign corporation not engaged in trade or business within the United States."

Sections 235 (a) and 236 (a) fix six months after the close of the taxable year as the time within which to file a return and pay the tax due by any foreign corporation not "having an office or place of business" within the United States.

Section 53 (b) (2) provides that the returns of corporations shall be made to the collector of the district in which is located "the principal place of business" or "principal

office" or "agency of the corporation," or if it has no "principal place of business" or "principal office" or "agency" in the United States, then to the collector at Baltimore, Maryland.

There is nothing in the history leading to the adoption of the Act, in the Committees' reports, or in the Act itself which suggests that Congress in enacting Section 231 had any intention but to classify resident and nonresident foreign corporations solely upon the ground of accessibility of the corporation and its records to the Collector.

That administrative convenience was the sole purpose to be served by the revised method of taxing nonresident foreign corporations and aliens was the view taken in the dissenting opinion of the Board of Tax Appeals below (R. 30-33), in which three members concurred. It became the unanimous view of the Board in the later decision of *B. W. Jones Trust for Brigadier General O. C. Herbert, by D. B. Nevius, one of the Trustees, et al.* v. *Commissioner of Internal Revenue* (March 10, 1942) 46 B. T. A. 531, 534, in which it was held that an office maintained by the trustees of a trust created in England, some of the trust property being kept here, came within the meaning of Section 211 (a) of the Revenue Act of 1936, the provisions of which, with respect to resident and nonresident aliens, are substantially similar to those relating to foreign corporations contained in Section 231. The trust did no business here, and did not intend to do any business here other than the buying and selling of securities constituting part of the trust fund. The Board of Tax Appeals said (p. 534):

> "Prior to the enactment of the Revenue Act of 1936, the taxing authorities experienced great difficulty in collecting the tax from nonresident aliens. In 1936 a new method of taxation of such aliens was substituted for the former 'theoretical' method which had been found impractical in application. See H. R. No. 2475,

74th Cong., 2d sess.; S. R. No. 2156, 74th Cong., 2d sess. In brief, after the enactment of the Revenue Act of 1936, the taxation of aliens became more simplified. Where the alien is a resident of this country, is engaged in a trade or business here, or has an office or place of business in the United States, he is taxed, with certain limitations, in the same manner as a citizen of the United States. Where, on the other hand, the taxpayer is a nonresident alien doing no business here and having no office or place of business in the United States, he is taxed on his fixed or determinable annual or periodic income from sources within the United States and the tax is withheld at the source."

III. The regulation as applied by the court below is neither reasonable nor consistent with the statute.

The Circuit Court of Appeals decided this case on its previous opinion in the *Linen Thread* case, in which it had held that the statutory provisions were limited by Treasury Regulations 94, promulgated under the Revenue Act of 1936, which provide:

"ART. 231-1. TAXATION OF FOREIGN CORPORATIONS. * * *

* * * * * * *

"(b) *Resident foreign corporations.* * * *

"Whether a foreign corporation has an 'office or place of business' within the United States depends upon the facts in a particular case. The term 'office or place of business,' however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected.

* * * * * * *"

The regulation, it will be observed, does not attempt to define "office or place of business," but makes the deter-

mination whether one exists depend upon the facts in the particular case. That it is a place where regular, as distinguished from casual or incidental, transactions are effected is implied in the common meaning of an office. The regulation does not exclude all offices except business offices or offices at which the principal business of the corporation is carried on.

The Circuit Court of Appeals, however, construed the regulation as limiting the meaning of office to one at which the regular and principal business of the corporation is carried on. This is an invalid limitation of the plain meaning of the words of the statute. So interpreted, the regulation is unreasonable and contradicts the statute under which it was promulgated. The regulation cannot narrow the meaning of the statute. *Neuberger* v. *Commissioner* (1940), 311 U. S. 83, 89.

A regulation containing a clear definition of words used in a statute which require elucidation, provided it is neither unreasonable nor inconsistent with the statute, is entitled to consideration and will not be overruled except for weighty reasons. *Fawcus Machine Company* v. *United States* (1931), 282 U. S. 375; *Manhattan Co.* v. *Commissioner* (1936), 297 U. S. 129; *Magruder* v. *Washington B. & A. Realty Corp.* (1941), 315 U. S. —, 86 S. Ct. 858. The Court, however, is not bound by the administrative construction embodied in regulations. *Burnet* v. *Chicago Portrait Co.* (1931), 285 U. S. 1, 16.

A regulation which sets up a definition conflicting with the terms of the statute and eliminating conditions specified in the statute, so as to require words and phrases to be stricken out and others to be substituted for them, is unreasonable and inconsistent with the statute and, therefore, void. *Lynch* v. *Tilden Co.* (1923), 265 U. S. 315, 321.

The regulation in question, as applied by the Court below, is neither reasonable nor consistent with the statute. As

so applied, the regulation requires the phrase "office or place of business" to be stricken from the statute and the phrase "office for the transaction and carrying on of business or other place of business" to be substituted therefor. The construction adopted by the Court below deprives the phrase "office or place of business" of all practical content and renders it superfluous. It limits the statute solely to corporations which are engaged in trade or business in the United States.

The vice of the regulation as applied by the Court is that it assumes to convert a question of fact as to whether or not an office exists under the statute into a conclusive presumption that no office exists unless it is an office for the transaction of the principal business of the corporation.

> "This is beyond administrative power. The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." *Miller* v. *United States* (1934), 294 U. S. 435, 440.

The Circuit Court of Appeals, in affirming on the basis of its opinion in the *Linen Thread* case, did not attempt to determine whether petitioner had an office in fact. It also failed to differentiate this case from the *Linen Thread* case on the obvious facts. In that case, the Court was guided solely by the findings of fact of the Board of Tax Appeals, since the record was not brought up by the petition for review. In this case, the entire record was before the Circuit Court. If that Court had considered the record it would have found ample evidence that the petitioner maintained an office in fact within the meaning of the statute. Petitioner did not use the office of an agent. Its office was one regularly maintained by the corporation itself.

The Circuit Court in its opinion in the *Linen Thread* case stated that substantial weight should be given to the fact that the administrative interpretation contained in the regulation has not led to any change in the statute, citing *U. S.* v. *Dakota Montana Oil Co.* (1932), 288 U. S. 459; *Taft* v. *Commissioner* (1937), 304 U. S. 351. This would be true if the regulation contained a clear definition of ambiguous statutory language, or stated in certain and unequivocal language the exceptions to be excluded from the application of the statute. That was the type of regulation this Court had under consideration in the cases cited by the Circuit Court.

An ambiguous regulation, on the other hand, or one which does not on its face adopt one of the several possible meanings of the statute, cannot be said to have received legislative approval by the subsequent re-enactment of the statute without change. Ambiguous regulations are of little value in resolving statutory ambiguities. *Burnet* v. *Chicago Portrait Co., supra.*

Here, it is not so much the regulation, but the way in which the regulation has been interpreted and applied that contravenes the statute. Even if Congress had approved the regulation there can be no basis for asserting that it has approved the present peculiar application of such regulation.

Conclusion.

Under the statute only one interpretation is permissible, to-wit: a foreign corporation which maintains an office in the United States at a fixed place at which the Collector can regularly find a properly authorized agent of the corporation and adequate records of the corporation's American income, a place at which such income is received and disbursed, and a place where the Collector can enforce

payment of the tax, is a resident foreign corporation taxable under Section 231 (b) of the Revenue Act of 1936 and cannot be taxed under Section 231 (a) of that Act.

A writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals for the Second Circuit and finally reverse it.

Dated: New York, N. Y., August 5, 1942.

Respectfully submitted,

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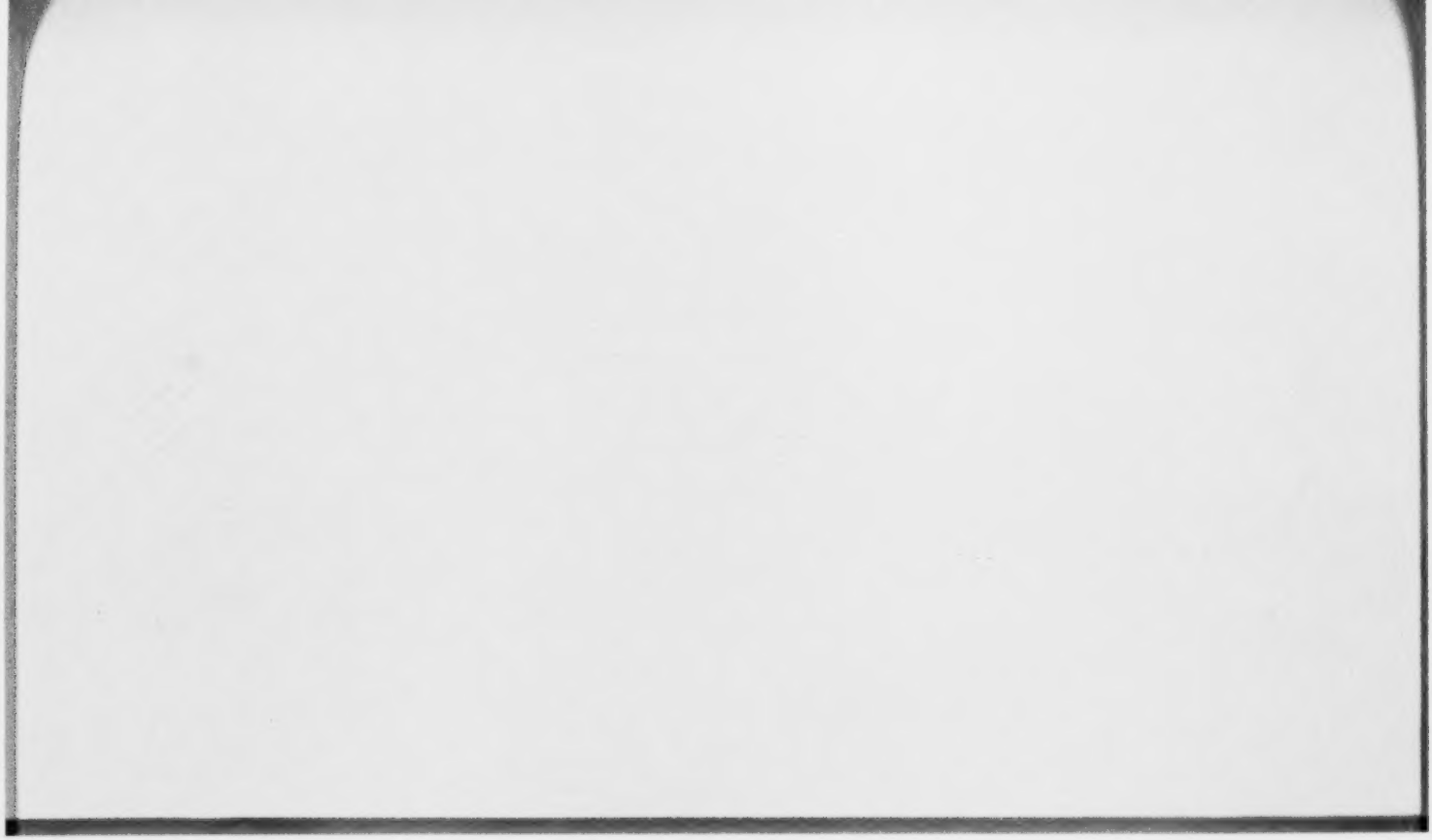
Counsel for Petitioner.



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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 309

AKTIEBOLAGET SEPARATOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Board of Tax Appeals (R. 19–33) are reported in 45 B. T. A. 243. The *per curiam* opinion of the Circuit Court of Appeals (R. 136) is reported in 128 F. (2d) 739.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 6, 1942 (R. 136–137). The petition for a writ of certiorari was filed August 17, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer, a Swedish corporation, had an office in the United States within the meaning of section 231 of the Revenue Act of 1936 and is therefore taxable as a resident foreign corporation under subsection (b), or whether it is taxable as a nonresident foreign corporation under subsection (a).

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 231. TAX ON FOREIGN CORPORATIONS.
>
> (a) *Nonresident Corporations.*—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 13 and 14, upon the amount received by every foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, except that in the case of dividends the rate shall be 10 per centum, and except that in the case of corporations organized under the laws of a contiguous country such rate of 10 per centum with respect to dividends shall be

reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country.

(b) *Resident Corporations.*—A foreign corporation engaged in trade or business within the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a), but the normal tax imposed by section 13 shall be at the rate of 22 per centum instead of at the rates provided in such section.

* * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 231–1. *Taxation of foreign corporations.*—

* * * * *

(b) *Resident foreign corporations.*—

* * *

Whether a foreign corporation has an "office or place of business" within the United States depends upon the facts in a particular case. The term "office or place of business," however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected.

* * * * *

STATEMENT

The findings of the Board of Tax Appeals (R. 19–26) may be summarized as follows:

Petitioner corporation was organized in 1883 under the laws of the Kingdom of Sweden; it is engaged in the manufacture of centrifugal machines, having interests in Europe and elsewhere, and has at all times maintained its principal office in Stockholm, Sweden. It was not during the tax year 1936 engaged in trade or business within the United States, and none of its officers were located in the United States during that period (R. 19). In 1936 petitioner's entire income from American sources consisted of dividends on stock which it owned in two New Jersey corporations, De Laval Separator Company and De Laval Steam Turbine Company;[1] the former had its principal office at 165 Broadway, New York, N. Y.; the latter had an executive office at the same address, but maintained its principal place of business in Trenton, New Jersey.

The De Laval companies' offices at 165 Broadway have been maintained since 1907 on the fifteenth floor of the building, under a lease held by the Separator company. F. J. Arend has been president of both companies; before, during, and

[1] Petitioner owned approximately 85 percent of the Separator company's stock, on which it received a dividend of $531,093.75 December 18, 1936; on December 21, 1936, petitioner received a dividend of $162,880 from the Turbine company (R. 20).

since the tax year he has employed Agnes Cheney as a private secretary, who has received for her services a salary of approximately $3,600 a year. While so employed she has occupied room 1521, part of the leased premises[2] (R. 20). On October 23, 1936, the Separator company sublet room 1521 to petitioner at an annual rental of $500; the sublease was subject to the principal lease, was terminable by the Separator company on 30 days' notice, and was subject to a reserved right in Separator to use the office for its own purposes to the extent that such use would not interfere with the occupation of petitioner. By letters of the same date petitioner employed Miss Cheney at a monthly salary of $25 to perform certain functions in addition to her duties with the De Laval companies; she was directed: to receive all dividend checks from American corporations and deposit them in an account to be opened by petitioner with the Marine Midland Trust Company of New York, and cable petitioner on receipt of any dividends; to keep a record of dividends received and bank deposits and withdrawals, submitting to petitioner a monthly report of entries; to receive mail and other communications addressed to petitioner and forward these to Stockholm; to procure office supplies, including stationery; to cause a notice of petitioner's name to be

[2] The office adjoined Arend's, and was equipped with the usual office furniture (R. 20; 76).

placed on the door to room 1521 and on the bulletin boards of the building; to obtain necessary tax returns, complete them, transmit them to Stockholm for verification and signature, and file them on their return (R. 21). She was authorized to sign petitioner's checks on an account to be opened with the Chemical Bank and Trust Company of New York, to pay the expenses of petitioner's New York office, including her own salary, but she was not authorized to sign checks drawn on the Marine Midland Trust Company.[3] In a letter dated December 22, 1936, petitioner directed Miss Cheney, until further notice, to remit to its Stockholm office by cable 90 percent of all dividends received from the De Laval companies, depositing 10 percent in the Marine Midland Trust Company (R. 22).

Since November 1, 1936, Miss Cheney's duties for petitioner have consisted of performing the activities directed and authorized (summarized in the preceding paragraph) (R. 22; see R. 23–24). She attended the office regularly, and used the same desk and typewriter in room 1521 for her employment by petitioner as she used for the duties with the De Laval companies (R. 24). By letters from Stockholm, dated November 12, 1936, petitioner's managing director advised both companies that petitioner had opened an office in New

[3] Arend was authorized to sign checks drawn on both banks. The two bank accounts of petitioner were opened in November or December 1936 (R. 22).

York, and instructed them to deliver dividends to it at that office. The De Laval companies forwarded these letters to the Commissioner of Internal Revenue, advising him that they would thereafter pay dividends to petitioner in New York, without withholding any tax.[4] The Deputy Commissioner on December 9, 1936, advised the two companies that they were relieved of liability to withhold tax from dividends paid after July 1, 1936 (R. 25). The De Laval companies did not withhold any federal income taxes on the dividends which they paid to petitioner in December 1936; these were paid entirely to petitioner at room 1521 and were deposited with the Marine Midland Trust Company (R. 25–26).

Miss Cheney, with the assistance of counsel and of the auditor for the De Laval companies, prepared petitioner's federal income-tax return for 1936; this was subsequently filed with a collector[5] (R. 24). The Commissioner determined a deficiency in tax on the basis that petitioner was tax-

[4] The withholding procedure was applicable in the case of nonresident foreign corporations under section 231 (a). Section 144 of the Revenue Act of 1936.

[5] Miss Cheney also prepared for petitioner a capital-stock tax return for the year ending June 30, 1937. Exemption from tax was claimed and was allowed by the Deputy Commissioner on May 21, 1938, because the evidence presented by petitioner disclosed that it "was not doing business in the United States" (R. 24–25). Section 105 (b) of the Revenue Act of 1935, as amended by section 401 of the Revenue Act of 1936.

able as a nonresident foreign corporation rather than as a resident foreign corporation[6] (R. 19). The Board of Tax Appeals sustained the Commissioner, three members dissenting (R. 26, 30, 34). The Circuit Court of Appeals affirmed *per curiam* on the authority of its decision in *Linen Thread Co.* v. *Commissioner,* 128 F. (2d) 166.

ARGUMENT

Section 231 (b) of the Revenue Act of 1936 defines a resident foreign corporation as one "engaged in trade or business within the United States or having an office or place of business therein." Petitioner does not contend that it was engaged in trade or business within the United States during 1936 (see Pet. 14–16; cf. Statement, *supra,* page 7, note 5), but it contends that it had an office or place of business in this country during the tax year. Admittedly the asserted "office" in room 1521 at 165 Broadway, New York, was not used or kept for the transaction of any of petitioner's regular business (see Pet. 16, 17, 19).[7]

[6] In the case of the former, not only was the tax to be withheld (section 144), but it was imposed on gross income (section 231 (a)); in the case of the latter the tax was payable by the taxpayer and was levied on net income, after allowable deductions (section 231 (b); see Pet. Ex. 29, R. 124).

[7] The letter of October 23, 1936, containing petitioner's instructions to Miss Cheney concerning the duties of her employment by petitioner (see Statement, *supra,* page 5) specifically stated that she was not authorized to engage in any activities on behalf of the corporation except the limited

The applicable regulations provide that the term "office or place of business" implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be or are effected. Regulations 94, Art. 231–1 (b). Clearly petitioner did not in 1936 maintain an office or place of business within their meaning. The regulations have been continued for later years in which there has been no change in the statutory definition. Regulations 101, Art. 231–1 (b); Regulations 103, Sec. 19.231–1 (b). Accordingly, substantial weight is properly given to the administrative interpretation of the tax statute. *Taft* v. *Commissioner*, 304 U. S. 351; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459. In any event the regulations are reasonable and therefore should control. Cf. *Magruder* v. *Washington, B. & A. Realty Corp.*, 316 U. S. 69; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375; see *Manhattan Co.* v. *Commissioner*, 297 U. S. 129, 134.

Petitioner attacks the regulations (Pet. 23–24), contending that they do violence to the statute by

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activities described in the letter (see pages 5–6, *supra*) (Pet. Ex. 3, R. 88, 89).

The Board found (R. 22) that the only purposes for which Miss Cheney was employed by petitioner and room 1521 subleased were the activities referred to earlier (see pages 5–6, *supra*). Miss Cheney testified (R. 76) and the Board found (R. 24) that petitioner's managing director used room 1521 when he was in the United States.

nullifying the phrase "office or place of business". But that result does not follow. A foreign corporation may have an office or place of business in the United States within the meaning of the regulations for the potential transaction of business without being "engaged in trade or business within the United States". See *Linen Thread Co.* v. *Commissioner, supra,* at 169. Here, however, the so-called office was not established for any such purpose, and it was within the discretion of the Treasury to frame its regulations so as to exclude such a place from the statutory concept of "office". Petitioner also seeks to invalidate the regulations as inconsistent with the statute by interpreting the statutory term "office," on the basis of legislative history, to mean any fixed place in the United States where a representative of the foreign corporation can be found for the purpose of effective revenue collection (Pet. 11–14). Petitioner points out (Pet. 11) that before 1936 all foreign corporations were taxed on their net income from sources within the United States. Tax was then withheld at the source of income in the case of corporations "not engaged in trade or business within the United States and not having any office or place of business therein". *E. g.,* section 144 of the Revenue Act of 1934. The 1936 revision consisted in taxing the latter class of nonresident foreign corporations on gross income rather than net income, in order to promote efficiency in income-tax col-

lection. See H. Rep. No. 2475, 74th Cong., 2d Sess., 10; S. Rep. No. 2156, 74th Cong., 2d Sess., 23. This history is clearly inadequate to support petitioner's inference concerning the meaning of the statutory term "office" since there is no indication that Congress by the 1936 change intended to alter the significance of the phrase employed to designate resident foreign corporations, which had been employed for a number of years in the withholding provisions dealing with foreign corporations. *E. g.,* section 145 of the Revenue Act of 1928; section 144 of the Revenue Acts of 1932 and 1934.

Petitioner's other contentions are equally without substance. The suggestion (Pet. 21–22) that the Board of Tax Appeals has subsequently receded from the position which it and the court below took in the present case and has embraced the argument here made by petitioner is altogether negatived by the later opinion of the Board and by the plainly different factual situation. See *B. W. Jones Trust,* 46 B. T. A. 531, 533–534, 537–538. Petitioner's assertion of conflict (Pet. 6) by the decision below with cases[*] holding that a corporation may have an office within a particular jurisdiction without being engaged in business there is unfounded, especially in view of the dis-

[*] *Green* v. *Chicago, B. & Q. Ry.*, 205 U. S. 530; *Toledo Rys. & Light Co.* v. *Hill*, 244 U. S. 49; *McCoach* v. *Minehill & Schuylkill Haven R. R.*, 228 U. S. 295.

similarity of the issues in those cases to the statutory tax question in the present case.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and presents no conflict. It is therefore respectfully submitted that the petition should be denied.

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SEPTEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942